Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

Nº. 98-905, 98-907

In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

AJAY PATEL, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

CLINTON H. CODDINGTON*
RICHARD G. GROTCH
Coddington, Hicks & Danforth
555 Twin Dolphin Drive, Suite 300
Redwood City, California 94065
(650) 592-5400

Attorneys for Respondents
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆816-453-2424

2798

QUESTIONS PRESENTED

1. Did the court of appeals correctly rule that *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) does not apply retroactively to require the setting aside of a verdict, on the ground of improper venue, in a consolidated liability trial held four years previously? Alternatively, can the judgment below be affirmed on the ground that: (i) the petitioners failed to preserve their objection to the district court's order transferring the cases to itself under 28 U.S.C. § 1404(a); or, (ii) the district court's transfer order was authorized by 28 U.S.C. § 157(b)?

2. Did the court of appeals correctly rule that, when plaintiffs base their claims of wilful misconduct under the Warsaw Convention upon alleged misrepresentations regarding security by the air carrier, plaintiffs must prove that the accident (a hijacking) would not have occurred if the carrier had done all that it said it would in the representations it made?

Corporate Disclosure Statement

Pursuant to Rule 29.6, respondent makes the following disclosure. At the time of the incident giving rise to this action and at the time of the district court trial, respondent Pan American World Airways, Inc. and Alert Management Systems, Inc. were a direct, wholly owned subsidiary of Pan Am Corporation. Pan American World Airways, Inc. then had the following subsidiaries and affiliates which were not wholly owned: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Social Immobiliaria Norteamericana, S.A. and Société International de Télécommunications Aeronautiques.

Currently, Pan Am Corporation and the operating entities which were its direct, wholly owned subsidiaries, are in the final stages of liquidation following bankruptcy. The name Pan American World Airways, Inc. was sold through the bankruptcy proceedings and any entity now using that name is unrelated to the parties to this proceeding.

TABLE OF CONTENTS

I. STATUTORY PROVISIONS 1

II. STATEMENT OF THE CASE 2

A. The Hijacking 2

B. The Claims Against Pan Am 2

C. Consolidation for Trial 4

D. Trial and Verdict 4

E. Post-Trial Proceedings 5

III. REASONS FOR DENYING THE WRIT 6

A. Introduction 6

B. The *Lexecon* Decision Was Properly Considered By The Second Circuit 7

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits 7

2. There Are Alternative Grounds for Affirmance of The Second Circuit's Decision 8

a. Petitioners Waived Any Venue Objections 8

b. Transfer to the Southern District of New York For A Consolidated Liability Trial Was Permitted Under 28 U.S.C. § 157(b)(5) 10

c. The Second Circuit Correctly Addressed The Merits of *Lexecon* 12

C. The Second Circuit Decision Applied The Correct Standard Of Causation For A Wilful Misconduct Claim Based on Fraud 13

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits 13

2. There Is No Likelihood The Issue Raised By Petitioners Will Recur. .14

a. The IATA Intercarrier Agreement Renders Petitioners' Arguments Moot 14

b. Montreal Protocol No. 4 Renders Petitioners' Arguments Moot 14

3. Petitioners Failed To Preserve Any Objection To The Manner In Which The Jury Was Instructed On The Standard Of Causation 16

4. The Second Circuit's Analysis of Causation Was Correct And Consonant With The Convention's Primary Purpose Of Limiting Liability 17

IV. CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Chevron Oil v. Huson, 404 U.S. 97,
92 S.Ct. 349, 30 L.Ed.2d 296 (1971) 12

El Al Israel Airlines, Ltd., v. Tseng,
1999 WL 7724 (1999) 18

Harper v. Virginia Dep't of Taxation,
509 U.S. 86, 113 S.Ct. 2510,
125 L.Ed.2d 74 (1993) 12

In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986,
920 F.Supp. 408 (S.D.N.Y. 1996) 5

In re Pan American Corp.,
950 F.2d 839 (2d Cir. 1991) 10

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26, 118 S.Ct. 956,
140 L.Ed.2d 62 (1998) ..... *passim*

Shah v. Pan American World Services, Inc.,
148 F.3d 84 (2d Cir. 1998) 6

Zicherman v. Korean Air Lines Co., Inc.,
516 U.S. 217, 116 S.Ct. 629,
133 L.Ed.2d 596 (1996) 17

STATUTES, RULES & TREATIES:

Agreement Relating to Liability Limitation of the
Warsaw Convention and the Hague Protocol,
Agreement CAB 18990, approved by order
E-23680, May 18, 1966 (Docket 17325) 3

Convention for the Unification of Certain
Rules Relating to International Transportation
By Air, *done* at Warsaw, Oct. 12, 1929,
49 Stat. 3000, T.S. 876 (1934), *reprinted at*
note following 49 U.S.C. App. § 40105 3

IATA Agreement on Measures to Implement the
IATA Intercarrier Agreement opened, for
signature in May 1996 14

Montreal Protocol No. 4 to Amend the Convention
for the Unification of Certain Rules Relating
to International Carriage By Air, signed at

Warsaw on October 12, 1929, as amended
by the Protocol Done at the Hague on
September 8, 1955, reprinted in
S. Exec. Rep. No. 105-20, pp. 21-32 (1998) 15

28 U.S.C. § 157(b)(5) 1, 4, 9, 10, 11
28 U.S.C. § 1404(a) 4, 9, 10, 11
28 U.S.C. § 1406(b) 8
28 U.S.C. § 1407 ..... 4, 8, 11
28 U.S.C. § 2111 10

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Pan American World Airways, Inc. and Alert Management Systems, Inc. (hereinafter collectively referred to as "Pan Am") respectfully pray that the petitions for certiorari filed in these cases on behalf of petitioners[1] be denied.[2]

I.

STATUTORY PROVISIONS

In addition to the statutory and treaty provisions set forth in the petitions, 28 U.S.C. § 157(b)(5) is applicable and provides that:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the

---

[1]This brief is filed in opposition to the petitions for certiorari filed in Docket No. 98-905 (*Singh v. Pan American World Airways, Inc.*) ("Singh petitioners") and Docket No. 98-907 (*Patel v. Pan American World Airways, Inc.*) ("Patel petitioners"). Both petitions pertain to the same district court and court of appeals proceedings and raise the same issues for review by this Court.

[2]Citation to the petition for certiorari filed by the Singh petitioners will be to "Singh Pet."; citation to the petition for certiorari filed by the Patel petitioners will be to "Patel Pet."; citation to the appendices to the petitions will be to "Singh App." and "Patel App.," respectively.

bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

II.
STATEMENT OF THE CASE

A. The Hijacking

By means of a carefully planned and well-executed criminal scheme orchestrated by the Abu Nidal Organization, Pan Am flight 73 was hijacked while on the tarmac in Karachi, Pakistan. That attack occurred more than a dozen years ago. At the time of the hijacking, the jumbo jet was in an area heavily guarded and patrolled by the Pakistan government's armed Airport Security Force. (Under local law, Pan Am did not provide and could not have provided security for its passengers and aircraft.) The well-protected perimeter of security at the airport was penetrated by sophisticated terrorists who employed an unprecedented "deception and disguise" method of attack. In the course of the assault, a number of passengers aboard the plane were injured – some of them fatally.

B. The Claims Against Pan Am

Flight 73 had been destined for New York. Because the hijacking was an accident which occurred in international

air transport, the petitioners' claims were governed by the Warsaw Convention.[3] As supplemented by the Montreal Agreement[4] for flights serving the United States, the Convention limits air carrier liability for personal injury or wrongful death to $75,000 per passenger in all cases except those in which the plaintiffs can establish that the accident was caused by the wilful misconduct of the air carrier.

To free themselves from the treaty's limitations on liability, the petitioners urged that Pan Am engaged in wilful misconduct. Specifically, the claims were founded upon the contention that Pan Am's Alert Security Program, which had been announced several months before the hijacking, had not been properly implemented in Karachi. The Singh family petitioners additionally claimed that they would not have been on Flight 73 but for their reliance on a newspaper advertisement concerning the Alert Security Program.

---

[3]The treaty commonly known as the "Warsaw Convention" is formally entitled the Convention for the Unification of Certain Rules Relating to International Transportation By Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted at* note following 49 U.S.C. App. § 40105.

[4]Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 18, 1966 (Docket 17325).

C. Consolidation for Trial

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") transferred the cases against Pan Am for consolidated pretrial proceedings in the Southern District of New York. (Singh. App. at B-47). Thereafter, Pan Am moved that the cases be consolidated for a trial on common liability issues in the Southern District of New York. (*Id.* at B-48). Pan Am furnished two bases for this motion: (i) 28 U.S.C. § 1404(a) and (ii) 28 U.S.C. § 157(b)(5). (*Id.*) Section 157(b)(5) was applicable because Pan Am was in a bankruptcy reorganization that was pending in the Southern District of New York. (*Id.* at B-47 n.6). The court's transfer order did not specify the statutory basis for the order, referring instead to the reasons given at a hearing that was not transcribed. (*Id.* at A-10).

D. Trial and Verdict

Following the presentation of evidence over a period of six weeks in early 1994, the jury returned its special verdict. (*Id.* at B-80-81). Asked whether it found "by a fair preponderance of the evidence that [Pan Am] engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program," the jury answered, "Yes." (*Id.* at B-80). But questioned about whether it found, by the same quantum of proof "that the wilful misconduct of [Pan Am], in connection with the Alert Security Program, was a proximate cause of the hijacking," the jury responded, "No."

(*Id.* at B-81).[5] Petitioners did not object either to the instructions to the jury or to the special verdict form. (*Id.* at A-29).

E. Post-Trial Proceedings

Judgment was entered April 1, 1997, almost three years after trial. (*Id.* at B-80). Much of this intervening period of time was spent in the briefing of post-trial motions and, in particular, the Singh petitioners' efforts to try what they characterized as their "non-common" fraud claim against Pan Am. Ultimately, the district court rejected this effort and ruled that the Singh petitioners had no separate, viable claim for fraud. (*Id.* at B-61).[6]

---

[5]The jury also rejected the petitioners' claim that Pan Am engaged in wilful misconduct by flying into Karachi International Airport on the date of the hijacking. (Singh App. at B-81).

[6]The district court's memorandum and order dated February 14, 1996 is printed at *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*, 920 F.Supp. 408 (S.D.N.Y. 1996).

III.

REASONS FOR DENYING THE WRIT

A. Introduction

The court should deny review for several reasons. With respect to the *Lexecon* issue, there is no conflict between the decisions of any of the courts of appeals and petitioners have not identified one.[7] The question of retroactive application of *Lexecon* is not squarely presented because there are alternative grounds for affirmance. And, in all events, the Second Circuit's decision that *Lexecon* should not be applied retroactively to upset a trial held four years earlier was correct for the reasons given by that Court.

With respect to the issue of causation in a Warsaw Convention case which is founded upon allegations of fraud, petitioners claim that theirs is an issue of "first impression." This plain fact puts to rest any notion that there is a conflict in the decisions of the courts of appeals. Apart from being an allegedly novel issue in the 70 year history of the Convention, the question raised by the petitioners is unlikely to recur in the future, particularly in view of recent intercarrier agreements by which carriers have waived the limitations on liability under the Convention. To the extent that petitioners challenge the jury instructions, their objection was waived by

---

[7]The decision of the Second Circuit is published as *Shah v. Pan American World Services, Inc.*, 148 F.3d 84 (2d Cir. 1998).

their pretermission timely to complain. Moreover, the court of appeals was correct in ruling that the standard for proximate causation in a so-called fraud based wilful misconduct case is a matter of federal law. Finally, the court of appeals correctly held that under the Convention, the liability limitation will apply if the hijacking would have occurred even if the airline had fulfilled all its alleged promises of enhanced security. The argument postulated by the petitioners is contrary to the primary aim of the Convention: recognition of a uniform regime of limited liability in international air transportation.

B. The *Lexecon* Decision Was Properly Considered by the Second Circuit

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners have not identified a conflict in the decisions of the United States courts of appeals concerning whether *Lexecon* is to be applied retroactively – much less whether it is to be applied retroactively where the alleged conduct giving rise to the action occurred more than 12 years earlier and the trial that is sought to be undone took place more than four years earlier. There is no such conflict.

2. There Are Alternative Grounds for Affirmance of the Second Circuit's Decision

The issue regarding the retroactive application of *Lexecon* is not squarely presented because there are alternative grounds to affirm the court below.

a. Petitioners Waived Any Venue Objections

Lexecon instructs, *inter alia,* that an objection to venue may be waived under Section 1407(a). *Lexecon,* 118 S.Ct. at 963 n.1, 966 n.5. Under 28 U.S.C. § 1406(b), a party is required to "interpose timely and sufficient objections to venue."

In *Lexecon*, this Court forgave the petitioner's failure properly to move the JPML for remand because, while it had not sought remand from the Panel, the petitioner *had* "continuously objected" to the self-assignment in the district court (and even in petitions for extraordinary relief presented to the Ninth Circuit). *Lexecon,* 118 S.Ct. at 960, 966. Here, in contrast, to the extent there were any objections at all, they were neither timely nor sufficient.[8] The Second Circuit noted

---

[8]In *Lexecon*, for instance, the petitioners moved to remand under Section 1407. In the instant case, none of the plaintiff-petitioners did so. In *Lexecon*, the petitioners subsequently renewed their motion to remand under Section 1407; here, having failed to move for remand in the first

this argument, but had no cause to address it having found that *Lexecon* did not apply retroactively. (Singh App. at A-17).

In the instant case, there were, in fact, *no* pre-trial motions to remand presented to the transferee court. And petitioners made no application in this regard to the JPML or to any other tribunal. On May 14, 1993, in an order affecting "ALL CASES," the district judge detailed a schedule which included both pretrial and *trial* dates *in the transferee court*. Still, no one argued that venue was improper. Beyond waiving any venue objection in the district court, petitioners also failed adequately to assert the issue in the court of appeals.[9] Such pretermission to raise the transfer/venue issue

---

instance, there was no such prayer for petitioners to renew. The petitioners in *Lexecon* sought an interlocutory appeal through a Petition for Writ of Mandate from the Ninth Circuit; the petitioners here did not seek similar relief from the Second Circuit. And, in *Lexecon*, the petitioners pursued a post-judgment appeal of the transfer order. As noted above, and discussed further below, in the instant case, none of the petitioners challenged the propriety of venue in their opening or reply briefs to the Second Circuit.

[9]None of the four briefs filed by petitioners anywhere raised the issue that the district court improperly transferred the actions to itself for purposes of trial. Petitioners made neither mention of *Lexecon* nor of any arguments about the propriety of the transfers under either Sections 157(b)(5) or 1404(a), even although they filed their opening briefs

must be the result either of imprudence or an impermissible "wait and see" attitude. Of course, preventing two bites at the apple is among the primary reasons for the harmless error statute (28 U.S.C. § 2111).

b. Transfer to the Southern District of New York Was Permitted Under 28 U.S.C. § 157(b)(5)

When Pan Am moved for a consolidated liability trial in the transferee court, it did so pursuant to Section 157(b)(5)[10] or, *alternatively*, Section 1404(a). (Singh App. at

---

approximately two months after certiorari was granted in *Lexecon*. (Sections 157(b)(5) and 1404(a) are nowhere mentioned in the Patel briefs; in the Singh briefs they appear only once, in a footnote.)

[10]Pan Am initiated Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court of the Southern District of New York on January 8, 1991. (Singh App. at B-47 n.6).

In proceedings under Section 157(b)(5), "[t]ransfer should be the rule, abstention the exception." *In re Pan American Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). In *Pan American Corp.*, the Second Circuit founded its holding on several grounds, including (1) the mandatory language of Section 157(b)(5); (2) the legislative history, including "Congress' desire to eliminate the confusion, delay and inefficiencies associated with the Bankruptcy Act's limited

B-48). The Second Circuit relied on the joint pre-trial order as the basis for concluding that the district court had based its transfer on Section 1404. (*Id.* at A-10). But that order was drafted by the lawyers, not by the court. The district court itself, however, expressly noted in its post-trial opinion that Pan Am's motion was based on both statutes and stated that it had granted the motion without distinguishing between the two grounds. (*Id.* at B-48). The implication is that the district court relied on both Section 157(b) and Section 1404 in granting Pan Am's motion.

To be sure, the Second Circuit also reasoned that even if the district court had relied upon Section 157(b)(5), that Section 1407, as construed in *Lexecon*, would nonetheless have required a remand to the original fora. (Singh App. at A-12-13). This rationale is erroneous. The Court in *Lexecon* did not deal with the interplay between Sections 1407 and 157(b)(5). The latter is a unique provision that allows a court to transfer to itself cases pending in other federal districts – and even in state courts. It would make no sense to conclude that Section 1407 mandates a superfluous remand to the original courts in cases where Section 157(b)(5) authorizes

---

jurisdictional scheme"; and (3) "the manifest purpose of section 157(b)(5) . . . [which is] 'to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case."'" (950 F.2d at 845.)

the district court to transfer the cases to itself from those other courts.

c. The Second Circuit Correctly Addressed the Merits of *Lexecon*

Petitioners' urging – that *Lexecon* applies retroactively to this case – rests upon a fundamental misapprehension: that this Court was not serious when it said it was "unnecessary" to consider whether its decision "should be applied only prospectively" and when it therefore did not consider (*viz.* "reserved") the issue of retroactivity of its decision. *Lexecon*, 118 S.Ct. at 966 n.5.

Because in *Lexecon* the Court did not decide whether the decision would be retroactive, the Second Circuit was correct in recognizing that *Lexecon* was a case which, under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), did not require retroactive application. (Singh App. at A-14). Particularly was this true given that the ruling in *Lexecon* relates to venue, not, as in *Harper*, to an issue of constitutional right.

So too was the court of appeals correct in applying the *Chevron Oil* retroactivity analysis (*Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)) and in thus reaching the conclusion that retroactive application, in the instant case, would not be appropriate. (*Id.* at A-14-17).[11]

---

[11]Apart from application of the *Chevron Oil* factors which weigh decisively against retroactive application of

C. The Second Circuit Decision Applied the Correct Standard of Causation for a Wilful Misconduct Claim Based on Fraud

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners go to considerable lengths to characterize as an issue of "first impression" the question of what constitutes the appropriate causation standard in a fraud-based wilful misconduct claim under the Warsaw Convention. (See Singh Pet. at 10, 18; Patel Pet. at 16, 17 (calling the standard "unprecedented")). The fact that it has taken nearly 70 years for the question to arise under the Convention, belies petitioners' assertion that there is a compelling need for "this Court . . . [to] grant review to provide guidance on what the [causation] standard should be." (Singh Pet. at 18).

Lexecon in this case, retroactive application would also amount to a boon to these petitioners (who failed to preserve the point in any event, see *infra.*). This stroke of luck would result solely because of the twin, serendipitous facts that judgment and issuance of the mandate were not rendered with sufficient celerity by the district court and the court of appeals, respectively, to allow the case to become final before this Court rendered its decision in *Lexecon*. The verdict was rendered on April 14, 1994, and *Lexecon* was not decided until March 3, 1998, almost four years later.

2. There Is No Likelihood the Issue Raised by Petitioners Will Recur

Moreover, this causation issue, which has taken almost seven decades first to present itself, is vastly *less* likely to arise in the future.

a. The IATA Intercarrier Agreement Renders Petitioners' Arguments Moot

Under the IATA Intercarrier Agreement[12] which took effect in 1997, major international and United States air carriers agreed to forbear from availing themselves of the liability limitations of the Warsaw Convention. Under the IATA Intercarrier Agreement, passengers may assert claims for compensatory damages which are not subject to any ceiling without an accompanying requirement that they prove "wilful misconduct." With this change in the legal landscape, the issue presented by petitioners is irrelevant.

b. Montreal Protocol No. 4 Renders Petitioners' Argument Moot

To a substantial extent, petitioners' arguments depend upon the construction of Article 25 of the original Warsaw

---

[12]See, e.g., DOT Order 97-1-2 (January 8, 1997) adopting the majority of the terms of the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement opened, for signature in May 1996.

Convention, and in particular, linguistic quibbles about what was meant by particular terms used in the original French text of the treaty. In September 1998, however, the Senate ratified Montreal Protocol No. 4 to the Convention.[13] And with ratification, petitioners' pettifoggery evaporated. Because the Protocol significantly amends Article 25,[14] the various foreign language linguistic arguments advanced by petitioners have been settled prospectively.

---

[13]Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20, pp. 21-32 (1998).

[14]As amended, Article 25 states:

> In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

3. Petitioners Failed to Preserve Any Objection to the Manner in Which the Jury Was Instructed on the Standard of Causation

At its core, petitioners' complaint is with the way the jury was instructed on the issue of causation – that Pan Am's alleged wilful misconduct must have proximately caused the accident for purposes of recovering damages without limitation under the Convention. Petitioners take issue both with the jury charge and the special verdict form. As the Second Circuit correctly observed, however, the petitioners themselves (a) "fail[ed] to request a more precise charge," (b) "fail[ed] to object to the district court's proposed special verdict form," and (c) proffered their "own requested jury charge [which] asked 'whether the wilful misconduct was a proximate cause of the hijacking and deaths of the passengers.'" (Singh App. at 29, 32). In sum, petitioners waived any right to urge the objections here.[15]

---

[15]The scope of the petitioners' waiver of arguments concerning the standard of causation in a fraud-based wilful misconduct case assumes still greater proportions with respect to the Patel petitioners. The Patels did not even urge a fraud or misrepresentation claim in the district court and (presumably for that reason) made no complaint to the Second Circuit about the causation standard applied by the district court.

4. The Second Circuit's Analysis of Causation Was Correct and Consonant with the Convention's Primary Purpose of Limiting Liability

Finally, the court of appeals was correct in ruling that the standard for proximate causation between the wilful misconduct and the hijacking is a matter to be resolved under the law of the Convention. (Singh App. at A-23). In urging application of California state law, the Singh petitioners rely upon an erroneous reading of this Court's decision in *Zicherman v. Korean Air Lines Co., Inc.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996). *Zicherman* required resort to local law for resolution of the damages issue – but only because Article 24(2) of the Convention expressly deferred to local law on that precise point. 516 U.S. at 224-25, 116 S.Ct. 629. *Zicherman* supports the holding of the Second Circuit; it does not bolster the sinuous causation analysis advanced by the Singh petitioners.

The Second Circuit also correctly held that under the Convention, if the hijacking would have occurred even if the airline had fulfilled all its alleged security promises, the limitations of liability would apply.[16] (Singh App. at A-26-

---

[16]As the Second Circuit properly recognized, "[i]f . . . Pan Am's institution of the Alert program as promised would not have prevented the hijacking of Pan Am Flight 73, then the representation cannot have 'caused' [petitioners'] injuries any more than the failure to serve a promised meal .

27). To hold air carriers liable for damages that would have occurred regardless of whether the carrier's representations of enhanced security were ultimately performed as promised – as petitioners suggest – would be to assail the Convention's overriding purpose of limiting air carrier liability. (*Id.* at A-26). The Second Circuit's holding in the instant case is bolstered by this Court's most recent decision interpreting the treaty, *El Al Israel Airlines, Ltd., v. Tseng*, 1999 WL 7724 (1999), including the Court's reaffirmation of the conviction that "[t]he cardinal purpose of the Warsaw Convention . . . is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Id.* at *8.

. . and any 'reasonable relationship' between the representations and the injuries would be purely coincidental." (Singh App. at A-26). The court of appeals did not hold, contrary to what the Patel petitioners claim, that plaintiffs would be required to prove the carrier's "direct participation" in the hijacking. Rather, they would need only to establish that the carrier was in a position to prevent the attack – something they failed adequately to prove.

IV.
CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

Clinton H. Coddington*
Richard G. Grotch
Coddington, Hicks & Danforth
555 Twin Dolphin Drive, Suite 300
Redwood City, California 94065

(650) 592-5400

**Counsel of Record*